Cine Enterprises, Inc. *and* Transport, Local Delivery & Sales Drivers, Warehousemen and Helpers, Mining and Motion Picture Production, State of Arizona, Local Union No. 104, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 28–CA–9135

January 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 12, 1989, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a responsive brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's findings[1] and conclusions and to adopt the recommended Order, only to the extent consistent with this Decision and Order.

1. The judge found that the General Counsel failed to establish a prima facie case that the Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to hire drivers Al Barber, Dino Barber, and Demir Abli for its television movie ''Desert Rats.'' The judge concluded that Abli and the Barbers were refused employment, not because of their union affiliation or activities, but because of their confrontational approach when seeking work with the Respondent on March 23, 1988.[2] The judge further found that the Respondent's transportation coordinator typically hired drivers who previously had worked for him, which Abli and the Barbers had not, that the transportation coordinator had many other driver applicants from which to choose, and that the Respondent, in fact, hired eight union employees to perform production work. On these bases, the judge concluded that the General Counsel failed to establish that the Respondent unlawfully refused to hire the three alleged discriminatees.

The General Counsel excepts claiming, inter alia, that it met its initial burden under *Wright Line*[3] by establishing that the union membership and protected union activities of Abli and the Barbers were motivating factors in the Respondent's decision to deny them employment or to refuse to consider them for employment. The General Counsel further maintains that the Respondent failed to rebut this prima facie case by demonstrating that the alleged discriminatees would have been denied employment for reasons unrelated to their union or protected activities.[4] For the following reasons, we find merit in the General Counsel's exceptions and conclude that the Respondent's refusal to hire Demir Abli, Al Barber, and Dino Barber, or to consider them for hire, violated Section 8(a)(3) and (1).

The Respondent is engaged in the television, movie, and entertainment industry. On March 16, it commenced production of ''Desert Rats'' in Tempe, Arizona. On March 23, Teamsters Local 104 members and experienced movie drivers, Abli, Al Barber, and Dino Barber visited the hotel where the Respondent's production offices were located to apply for driving work. Outside the hotel, they met the Respondent's transportation coordinator, Kenny Mason, who informed them that Production Manager Kline was responsible for hiring. Abli and the Barbers knew Mason because he was a fellow Local 104 member and because the Barbers previously had filed intraunion charges against him.[5]

After speaking to Mason, Abli and the Barbers entered the hotel and attempted to locate Kline. Initially, they entered the open door of a production office where several men, including Kline, Producer Malden, and Location Manager Marshall, were meeting. None of the alleged discriminatees knew Kline or Malden. Al Barber asked where they might find Kline.[6] Instead

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge erroneously referred to Al Barber as ''Parker'' in fn. 3 of his decision. We correct this error.

[2] All dates are in 1988 unless noted.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[4] The General Counsel also excepts to the judge's failure to draw an adverse inference against the Respondent for failing to call Production Manager Kline as a witness. As Kline was terminated by the Respondent prior to the hearing, however, it cannot reasonably be assumed that he is favorably disposed towards it. In these circumstances, it is well settled that an adverse inference will not be drawn. *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), enfd. on other grounds 863 F.2d 964 (D.C. Cir. 1988).

Although we reject the General Counsel's adverse inference argument, because Kline did not testify we similarly discount the judge's speculations why Kline refused to identify himself to the alleged discriminatees on March 23, or why he unlawfully stated that Teamsters drivers would not be hired.

[5] Specifically, in 1985, Al Barber filed charges against Mason during the production of ''Murphy's Romance,'' claiming that Mason caused another union member to be fired. Al Barber testified that after the Union investigated the matter, the discharged employee was reinstated. Barber said that the reinstatement angered Mason, who threatened to quit. In 1986, Al Barber filed charges alleging that Mason had caused a union member to be fired and others not to be hired on the set of ''American Anthem.'' Mason testified that these charges were dropped. Finally, in 1987, Al and Dino Barber, along with other union members, filed intraunion charges against Mason for crossing the Union's informational picket line. As a result of the 1987 charges, Mason, then a supervisor, was expelled from the Union for nonpayment of a fine. He was subsequently readmitted after the fine was paid.

[6] The judge characterized Al Barber's entrance into the production office as ''bullish'' and ''intimidating,'' based on Barber's failure to knock before entering, his approaching the Respondent's representatives closer than was reasonable, and his asking ''Where is Hank Kline?'' in a voice louder than was necessary. Although Al Barber exhibited behavior that arguably would be unconventional in the traditional job setting, the alleged discriminatees and the Respondent's industry are somewhat atypical. Thus, Abli and the Barbers, all physically imposing men, make their living by driving vehicles—frequently at

of identifying himself, Kline replied either ''He isn't here,'' or ''Nobody is here,'' and directed them to an adjoining production office. After they left, Marshall said that Abli and the Barbers were from the Teamsters Union and that he was certain Al Barber was there to talk about the Union.

Once in the second office, the three asked the Respondent's production coordinator where they could find Kline. The coordinator, who knew them from other jobs, and who closely associated Al Barber with the Teamsters Union, escorted the three men back into the office they had just vacated; only Kline and Malden remained. After introducing Kline to the alleged discriminatees, the coordinator left. Al Barber then asked if there were any driving jobs. Kline acknowledged that there were and either said ''We will take your name [and] . . . make a list,'' or ''We will take your names and we [will] call you back later.'' One of the three asked Kline if he was doing the hiring. When Kline demurred, saying that he was merely assembling a list of applicants, and that Mason was hiring, Dino Barber said that Mason had told them that Kline was doing the hiring. Kline repeated that he was merely taking names and that Mason was responsible for hiring. Because of Kline's and Mason's conflicting claims, Dino Barber left to fetch Mason, who was just outside the office.[7]

When Dino Barber and Mason returned, Kline asked Mason if he knew the three men. Mason admitted that he did, stating, ''Yeah, they are members from Local 104.'' The alleged discriminatees, whose testimony was credited by the judge, stated that Mason pointed at them and spoke sarcastically when identifying them to Kline. Kline then announced, ''We are not [a] union show, and we are not hiring any union members from Local 104 or any other Teamster local.'' When Al Barber asked Kline if he knew what he was saying, Kline responded that he did. Al Barber then turned to Malden, asked who he was, and inquired whether he had heard Kline's statement. When Malden affirmatively nodded, Kline interjected, ''I mean it.''[8]

Abli and the Barbers left the Respondent's offices. Approximately 20 minutes later, Malden notified Mason that he never wanted to see ''those goons'' again. Mason understood Malden to mean that Abli and the Barbers were not to be hired.

The Respondent hired approximately 34 transportation employees for ''Desert Rats,'' only 5 of whom were hired before April 1. Eight of the hires (including Mason) were Local 104 members. Actual production began on April 6 and concluded on April 26 or 27.

Contrary to the judge, we find that the evidence clearly establishes a prima facie case that the alleged discriminatees' union membership and activities were motivating factors in the Respondent's decision not to hire them or consider them for employment. *Wright Line*, supra at 1089. Initially, we note that the judge applied the incorrect standard when evaluating whether a prima facie case had been established. The test is not whether the Respondent has proffered a lawful defense for its action, but whether, viewed in isolation, the General Counsel's evidence supports an inference that protected activity was a motivating factor in the refusal to hire. *Bali Blinds Midwest*, 292 NLRB 243 fn. 2 (1989). Under this standard, the General Counsel clearly established a prima facie case.

Even before Abli and the Barbers had the opportunity to request work on March 23, Kline and Malden learned from Marshall that they were union members and that Al Barber was there to speak on behalf of the Union. Shortly after Al Barber asked Kline if drivers would be hired, Mason again identified the alleged discriminatees, disparagingly, as union members. Knowing that Abli and the Barbers were Local 104 members, and that Al Barber was a union spokesman, Kline forcefully and unlawfully rejected their employment request by announcing that no Local 104 members, nor indeed any Teamsters members, would be hired for driving work. Instead of repudiating Kline's unlawful statement, Malden, his superior,[9] merely affirmed that it had been made. Considered in toto, these statements and conduct by Kline, Mason, and Malden provide ample evidence that the discriminatees' union affiliation and/or activities were motivating factors in the Respondent's decision to deny them employment.

We further find that the Respondent failed to rebut this prima facie case by demonstrating that Abli and the Barbers would not have been hired regardless of their union affiliation or activities. Given the Respondent's knowledge of this union membership and activities, its unlawful statement that union members would not be hired, and its failure to repudiate that statement,

high speeds—on movie productions. They must compete with approximately 200 movie industry drivers in Arizona for short-term movie projects like the Respondent's, which they frequently learn of through industry contacts and word-of-mouth. Because of the strong competition and brief production schedules, movie industry drivers must ''hustle'' for work and frequently seek out job opportunities on production sites. In these circumstances, and given the brief foray into the production office, Al Barber's single question of the Respondent, and the three's prompt exiting of the office when directed by Kline, we find less than compelling the Respondent's claim that they were denied work solely because they lacked social graces. Moreover, as discussed below, the Respondent's contention is undermined further by its marked animus toward the Union and by its failure to apprise the three that their behavior was unacceptable.

[7] Given the Barbers' history of filing charges against Mason, the discriminatees understandably were interested in ascertaining who was responsible for hiring drivers for ''Desert Rats.''

[8] Based on this series of events, we later characterize Kline's behavior as aggressive, confrontational and provocative. (See fn. 11, infra.) The dissent asserts that this characterization is neither supported by the record nor in accord with the judge's findings. Nonetheless, this is the sequence of events found by the judge in sec. III,B of his decision, and it is fully supported by the credited testimony.

[9] Malden testified that Mason was responsible for hiring drivers and transportation equipment employees under the supervision of Kline. Malden admitted, however, that he retained ultimate authority to hire and fire employees on the ''Desert Rats'' production.

the Respondent bears an especially heavy burden of establishing that the alleged discriminatees would lawfully have been denied employment for reasons not associated with their union activity. The Respondent has not met that burden.

Initially, we reject the Respondent's claim that the demeanor of Abli and the Barbers during their first meeting with the Respondent on March 23 resulted in the refusal to hire. As we previously observed, this claim is less than compelling given the facts of this March 23 incident and the atypical nature of the industry. Moreover, assuming that the alleged discriminatees' conduct exceeded the bounds of acceptable behavior under the circumstances, we find it significant that the Respondent neither apprised them of this fact, nor even alluded to their behavior when refusing them work. On the contrary, the Respondent expressed strong antiunion animus and unequivocally announced that union members would not be hired: ''We are not [a] union show and we are not hiring any union members.''

We also reject the contention that this subsequent conduct on March 23 justified the Respondent's decision to deny the three employment. Any inappropriate conduct the three exhibited in their second meeting with Kline, Malden, and Mason directly resulted from the Respondent's provocations: Kline's crude efforts to dismiss them and Mason's and Kline's inconsistent statements as to hiring authority. It would not be surprising if the three were also unsettled by Mason's sarcasm when he identified them to Kline, and by Kline's forceful statement that union members would not be hired. In these circumstances, it was not untoward for Al Barber to brusquely approach Malden, ascertain his identity, and inquire whether he ratified Kline's stated unlawful intention not to hire union members.

Finally, we reject the Respondent's defenses that no drivers were being hired when Abli and the Barbers applied for work on March 23, that Mason had many other applicants, and that the discriminatees had not previously worked for Mason.[10] First, the complaint alleges both an unlawful refusal to hire the three and a refusal to consider them for hire. Thus, whether the Respondent was actually hiring drivers on March 23 is not controlling. The Respondent unequivocally informed the alleged discriminatees on that date that they would not be considered for employment. Second, the availability of other applicants and the alleged discriminatees' lack of work experience with Mason similarly is irrelevant. The Respondent acknowledged that the decision not to hire Abli and the Barbers was made on March 23. Any hiring that Mason undertook after that date, or any criteria he used in evaluating applicants, therefore is not determinative. Finally, as to the Respondent's defense that the three previously had not worked for it, Mason testified that he *did* hire drivers who had not worked for him before.[11]

Accordingly, because we find that the General Counsel established a prima facie 8(a)(3) case, and that the Respondent did not meet its burden of rebutting it, we reverse the judge and find that the Respondent violated the Act by unlawfully refusing to hire or consider for hire Al Barber, Dino Barber, and Demir Abli.

2. We further find, contrary to the judge, that the Respondent violated Section 8(a)(3) and (1) by refusing to employ, or consider for employment, Luke Jordan and John Fruin.

Luke Jordan is an experienced movie driver and Local 104 member.[12] He has known Al Barber for over 20 years, is a friend of both Barbers, and attended school with Dino Barber.

On March 30, Jordan and Fruin went to the Respondent's offices to apply, respectively, for driver and key grip or driver positions. According to the credited testimony,[13] Jordan asked Mason for driving work and additionally offered to rent the Respondent an insert car[14] that he had purchased from Al Barber and reconstructed. Fruin similarly offered to rent his pickup truck. In response to these offers, Mason retorted that he was not interested in ''anybody affiliated with Al Barber or any piece of equipment affiliated with Al Barber in any way.'' Jordan stressed that he had only purchased an insert car from Barber, that he was not affiliated with him, and that he and Fruin merely sought driving work. Mason replied that, as far as he was concerned, Jordan was affiliated with Barber.

The judge rejected the Respondent's argument that Jordan and Fruin were denied employment because Jordan had conditioned his hire on the rental of an insert car that Mason considered unsafe.[15] Instead, the judge found that Jordan and Fruin were denied employment because of Jordan's suspected connection

[10] The Respondent also claims that its hire of eight union members in the transportation department establishes that its refusal to hire Abli and the Barbers was not discriminatorily motivated. This argument is not persuasive. Other than Mason, only two union members were hired before the instant 8(a)(3) charges were filed. One driver was specifically requested by the art department and the other was the only union member who did not file a grievance against Mason on ''Unholy Matrimony,'' discussed infra.

[11] Just as we reject the Respondent's argument that Mason's hiring of union drivers after March 23 proves that Abli and the Barbers lawfully were denied employment, we discount the General Counsel's claim that Mason's hostility toward the Barbers for filing intraunion charges against him supports a violation. Mason's superiors, Kline and Malden, made it abundantly clear on March 23 that Abli and the Barbers would not be considered for employment. In these circumstances, any animus Mason harbored against the Barbers apparently was not a factor in the decision to deny them work. As discussed, infra, however, such animus would be relevant in evaluating Mason's subsequent hiring decisions.

[12] Since March 1987 Jordan has been suspended from the Union for nonpayment of dues.

[13] The judge credited Jordan's testimony over that of Mason. Fruin did not testify. Although he was subpoenaed by the General Counsel and flew in for the hearing from his California home, Fruin had to leave before he was scheduled to testify. It is unclear whether Fruin is a union member.

[14] An insert car carries a camera crew and is used for filming chase scenes.

[15] On the contrary, the judge found that the insert car, as reconstructed by Jordan, was in very good shape, which Mason well knew.

with Al Barber. Nonetheless, the judge concluded that no violation occurred because Al Barber lawfully had been denied employment: ''[I]t follows . . . that the . . . evidence regarding Mason's subsequent refusal to consider Jordan and Fruin for employment . . . must similarly be found to be insufficient to warrant the finding of unlawful [motive].'' infra. Although the judge noted that Mason's treatment of Jordan and Fruin may have been unfair or unwarranted, he concluded that it did not violate the Act. We disagree.

Because the Respondent violated the Act by refusing to employ Al Barber based on his union membership and activities, it follows that Mason's rejection of Jordan's and Fruin's job requests also is unlawful. Thus, Mason clearly denied Fruin and Jordan employment because of Jordan's suspected affiliation with Al Barber. Whether Mason made this decision based on personal animosity against Al Barber for filing intraunion charges against him, or on Kline's March 23 directive that union members not be hired, or because he understood Malden's comment about not seeing ''goons'' again to mean that no union members, or any individuals affiliated with Al Barber, should be hired, Mason acted unlawfully in denying Jordan and Fruin employment.

3. The judge found that the Respondent violated Section 8(a)(1) by refusing to hire Harry McCrorey because he signed a grievance petition during the production of ''Unholy Matrimony.'' No exceptions were taken to this finding. The General Counsel argues that the refusal to hire McCrorey additionally violates Section 8(a)(3). For the following reasons, we agree.

The facts are fully set forth in the judge's decision. Briefly, McCrorey is a Local 104 member and experienced wrangler driver who has worked with Mason on numerous shows, and socialized with Mason. In early 1988, Mason, as transportation coordinator, hired McCrorey for the movie ''Unholy Matrimony.'' In late February, during the production of ''Unholy Matrimony,'' Mason told McCrorey he had prospects for employment on another movie. When McCrorey indicated that he would again like to work for Mason, Mason assured him, ''You will be on it.''

In March, a dispute arose between the ''Unholy Matrimony'' management and drivers over the drivers' job descriptions and hours of work. On March 5, McCrorey and six other drivers signed a petition claiming an additional day's pay. Five of the seven petition signers were Local 104 members. On the day after this petition was submitted to Mason, all the signers were discharged. Unfair labor practice charges were subsequently filed.

After his discharge, McCrorey learned that Mason was the transportation coordinator on ''Desert Rats.'' McCrorey repeatedly telephoned Mason at work and at home, and wrote to Mason and Kline, in an effort to obtain work on the movie. When he received no response to his inquiries, McCrorey and his wife visited the Respondent's production offices on March 28. McCrorey spoke with Mason, told him he would like to work on ''Desert Rats,'' and said he hoped that Mason would not hold the ''Unholy Matrimony'' grievance against him. According to the credited testimony, Mason replied that ''In this business . . . you don't know who your friends are.'' Mason further stated that the petition had put him in a bad spot with the ''Unholy Matrimony'' production manager. Mason said that he had assured the production manager that union drivers would not cause problems, and that the petition belied his assurances. When McCrorey repeated his request for work, and his appeal that Mason not hold the ''Unholy Matrimony'' incident against him, Mason replied that the Union might picket ''Desert Rats.'' McCrorey stated that he would not cross a picket line, but again requested work. Mason answered that there was nothing he could do for McCrorey.

The foregoing facts clearly establish an 8(a)(3) violation in addition to the 8(a)(1) violation found by the judge. Thus, by denying McCrorey's March 28 employment requests because of the ''Unholy Matrimony'' petition, Mason plainly was reacting to McCrorey's union as well as protected concerted activities. Mason was upset by the ''Unholy Matrimony'' petition which McCrorey and, inter alia, several other Local 104 members signed, because it nullified Mason's representations to his boss that ''*union* drivers'' would pose no problem on ''Unholy Matrimony.'' Thus, on its face, Mason's March 28 statement to McCrorey establishes an 8(a)(3) refusal to hire. Moreover, in rejecting McCrorey's employment request, Mason gave credence to his record testimony that, when deciding to hire or not hire drivers, he takes into account whether they previously have given him a difficult time. Admittedly, McCrorey, like the Barbers, had given Mason trouble. As this ''trouble'' was privileged union and protected concerted activity, however, it can not lawfully support a refusal to hire. This conclusion is strengthened, by other evidence of the Respondent's animus and unlawful conduct. Thus, just 5 days before McCrorey spoke with Mason, Kline pronounced that union members would not be hired and the Respondent unlawfully refused to hire Abli and the Barbers.

In all of these circumstances, we find that the Respondent violated Section 8(a)(3) as well as Section 8(a)(1) by refusing to hire Harry McCrorey.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent told applicants for employment that it would not hire union members, in violation of Section 8(a)(1) of the Act.

3. The Respondent failed and refused to hire and to consider for hire Al Barber, Dino Barber, Demir Abli, Luke Jordan, and John Fruin in violation of Section 8(a)(3) and (1) of the Act.

4. The Respondent failed and refused to hire Harry McCrorey in violation of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make whole Al Barber, Dino Barber, Demir Abli, Luke Jordan, John Fruin, and Harry McCrorey for any loss of earnings and other benefits they suffered as a result of the Respondent's unlawful refusal to hire them or consider them for hire for ''Desert Rats.'' *F. W. Woolworth Co*., 90 NLRB 289 (1950). Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[16]

ORDER

The National Labor Relations Board orders that the Respondent, Cine Enterprises, Inc., Tempe, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Refusing to hire employees because they engaged in union or protected concerted activities.''

2. Insert the following as paragraph 1(c) and reletter the subsequent paragraph.

''(c) Refusing to hire or consider for hire employees because of their union membership or activities.''

3. Substitute the following for paragraph 2(a).

''(a) Make whole Al Barber, Dino Barber, Demir Abli, Luke Jordan, John Fruin, and Harry McCrorey for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in amended remedy section of this Decision and Order.''

4. Substitute the attached notice for that of the administrative law judge.

MEMBER DEVANEY, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by refusing to hire McCrorey because of his protected concerted activities. I do not agree with my colleagues, however, that the Respondent violated Section 8(a)(3) by failing to hire McCrorey or by failing to hire or consider for hire the five other alleged discriminatees.

In this regard, I agree with the judge that the Respondent did not hire Al and Dino Barber and Abli because of their rude and intimidating behavior during a meeting where Production Manager Kline, Transportation Coordinator Mason, and Producer Malden were present on March 23, 1988. Accordingly, I would dismiss this 8(a)(3) allegation of the complaint. Further, because I would find that the Barbers and Abli were not hired for nondiscriminatory reasons, I would also find, in agreement with the judge, that the Respondent's refusal to hire or consider for hire Jordan and Fruin was not unlawful. Finally, I would dismiss the 8(a)93) allegation as to McCrorey on the ground that there is insufficient evidence to establish that the Respondent's refusal to hire McCrorey was motivated by antiunion animus.

In my view, the issue of whether the Respondent violated Section 8(a)(3) by refusing to hire or consider for hire the six alleged discriminatees turns on the interpretation of Kline's March 23 statement to the Barbes and Abli that the Respondent was not a ''union show'' and was not hiring union personnel. Interpreting Kline's statement as the climactic moment of an unhappy and hostile incident that began with the three alleged discriminatees' abrupt and unannounced entrance into the meeting of the Respondent's officials, the judge found that Kline's statement, while a violation of Section 8(a)(1) of the Act, was made out of frustration and in an effort to get the three individuals, as peviously requested, to cease intruding in the management meeting. I agree.

Although I do not condone Kline's behavior, I would not find that it was indicative of an overarching motive not to hire union members on this project. In this regard, I note that the majority would discount Kline's statement as a pretext to get rid of the Barbers and Abli on the ground that if Kline was really affected by their rude and intimidating behavior, he would have told them that that was the real reason that they would not be considered for hire. In sum, majority would only be satisfied if kline confronted the three men. This view ignores the fact that Kline's behavior

[16] In his remedy discussion, the judge apparently concludes that McCrorey's entitlement to backpay ceased on April 11 when the Union began picketing the Respondent—based on McCrorey's statement to Mason that he would not cross a picket line. We disagree. The fact that McCrorey represented to Mason on March 28 that he would honor a potential picket line does not determine what McCrorey would have done when confronted with the reality of picketing. Depending on such factors as McCrorey's economic situation, the nature of the strike, and, indeed, whether a strike would have occurred without the Respondent's unfair labor practices, or simply a change of heart, McCrorey's March 28 position might have changed. As it is well settled that any ambiguity will be resolved against the wrongdoer, we will not terminate McCrorey's backpay rights solely on the basis of his prestrike representations to the Respondent. See generally *NLRB v. Textile Workers Local 1029, Granite State Joint Board*, 409 U.S. 213 (1972); *A & T Mfg. Co*., 280 NLRB 916, 917 (1986).

throughout the incident was indicative of one who is seeking to avoid a confrontation. It is in this light that I interpret Kline's statement.[1]

I also disagree with my colleagues' characterization of this single incident as two discrete confrontations in their attempt to give a different interpretation to Kline' statement. In this regard, I note that the majority discounsts the rude and intimidating behavior of the Barbers and Abli when they first entered the Respondent's meeting unannounced and uninvited on the ground that the industry involved is ''atypical,'' implying that rude and intimidating behavior is the norm in the movie production industry and that Kline should not have been threatened by it. The majority would then ascribe the alleged discriminatees' rude behavior on their second intrusion as a response to the actions of Kline and Mason. The majority then argues that the alleged discriminatees, whose behavior in the first incident was rude and abrasive in keeping with this ''atypical'' industry, were ''stunned'' by Mason's ''sarcasm'' and thus provoked to further rudeness. I do agree.

Because I would dismiss the 8(a)(3) allegations of the complaint as they pertain to the Barbers and Abli, I would also, for the reason explained above, dismiss the remaining 8(a)(3) allegations as to Jordan, Fruin, and McCrorey.

[1] I note that the majority finds it ''inexplicable'' that Kline did not ''call the discriminatees to task for their behavior'' on March 23. If Kline had engaged in the ''aggressive, confrontational and provocative behavior'' on March 23 that the majority asserts he did, I too might find Kline's silence ''Inexplicable.'' I find, however, that the majority's characterization of Kline's behavior in this regard is neither supported by the record nor in accord with the judge's findings. Consequently, I view the majority's reinterpretation of Kline's behavior on March 23 as no more than a futile attempt to recast the victim as the bully. I believe that if the majority would view Kline's reluctance to chastise the Barbers and Abli within the context of the events of March 23 as found by the judge, it would not find Kline's failure to chastise the discriminatees ''inexplicable.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell applicants for employment that we do not intend to hire union members.

WE WILL NOT refuse to hire employees or consider employees for hire because of their union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL make whole Al Barber, Dino Barber, Demir Abli, Luke Jordan, John Fruin, and Harry McCrorey for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

CINE ENTERPRISES, INC.

Guy David Knoller, Esq., of Phoenix, Arizona, for the Respondent.

Michael Karlson, Esq. and *Mitchell Rubin, Esq.*, of Phoenix, Arizona, for the Petitioner.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Phoenix, Arizona, on July 26, 27, and 28, 1988. The charge was filed on March 31, 1988,[1] by Transport, Local Delivery & Sales Drivers, Warehousemen and Helpers, Mining and Motion Picture Production, State of Arizona, Local Union No. 104, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union). Thereafter, on May 9, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Cine Enterprises, Inc. (Respondent), of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and counsel for Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Arizona corporation, has maintained an office and place of business in Tempe, Arizona, where it has been engaged in the television, movie, and entertainment industry and has been directly involved in the production of a television series pilot for NBC entitled ''Desert Rats.''

Based on its operations since March 15, at which time it commenced its operations in the State of Arizona, the Respondent will annually purchase and receive at its Tempe, Arizona location, goods and materials valued in excess of $50,000, and/or rent goods and materials the rental value of which will exceed $50,000, which goods and materials will be transported in interstate commerce and delivered to its places of business in the State of Arizona directly from suppliers located in States of the United States other than the State of Arizona.

[1] All dates or time period hereinafter are within 1988 unless otherwise stated.

It is admitted, and I find, that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings involve the Respondent's failure and refusal to hire certain drivers for its ''Desert Rats'' production. It is alleged that such conduct was motivated by unlawful considerations, namely, the employees' union activity or affiliation, and that by such conduct the Respondent has violated Section 8(a)(1) and (3) of the Act.

B. *The Facts*

1. The refusal to hire Al Barber, Dino Barber, and Demir Abli

On March 23, Al Barber, his son, Dino Barber, and Demir Abli, all members of the Union, visited Respondent's office at the Sheraton Mission Palms Hotel in Tempe, Arizona, where the Respondent, on March 16, had established its production headquarters for the making of ''Desert Rats,'' a movie for television.

The three individuals, experienced movie industry drivers, had heard that the filming was about to begin and intended to apply for driving jobs. When they arrived at the hotel's parking lot they saw Kenny Mason, Respondent's transportation coordinator, who advised them that Hank Kline, production manager, was doing the hiring. The three individuals then went to the Respondent's offices[2] and walked into an open door where several of Respondent's representatives, namely, Producer Boris Malden, Production Manager Hank Kline, and Location Manager Gerald Marshall were talking.

The three individuals entered the room and Al Barber asked where he could find the production manager. Hank Kline, whom the individuals did not know, apparently was preoccupied at the time and resented the interruption. He replied either that the production manager (Kline) was not there or that ''nobody is here,'' and directed the employees to the room next door which was being used as the production office.

Marshall testified that when Al Barber asked for Kline, ''the tone of his voice, his physical approach was an intimidating bullish approach.'' According to Marshall, Al Barber did not knock on the open door before he came into the room, did not ask permission to interrupt the meeting, spoke in a voice that was louder than was necessary, and, rather than standing at a reasonable distance, approached more closely than was reasonable under the circumstances.

When the three men left the room, Marshall advised Malden and Kline that the men were from the Teamsters Union, and added that he was certain that Al Barber was there to talk about the Teamsters Union.[3] Marshall then ''retreated to his office'' because he knew that Kline was going to be ''confronted with a situation.'' Marshall did not want to remain in the room to witness it because he felt it would be embarrassing for Kline as, according to Marshall, Kline is a very mild-mannered person who would be reluctant to direct the men to leave the office when further discussion (apparently Marshall erroneously believed the men had come to discuss union representation) reached a stalemate. He told Kline and Malden he would be in his office next door if they needed him.

The following account of what transpired thereafter is based on the testimony of Al and Dino Barber, and Abli, who corroborated each other's testimony in material respects.

The three individuals entered the office next door and Al Barber asked the production coordinator, Denise Zollman, where he could find Kline. Zollman, who knew the Barbers and Abli from working with them on other movie productions, then escorted them back to the room they had just left. Only Malden and Kline were present, however. Zollman then introduced Kline to the men and left the office.[4]

Al Barber asked Kline whether any driving jobs were available, and Kline acknowledged that drivers were being hired. Kline said, according to Abli, ''We will take your name, we [will] make a list. We'll take your name and call you later or something.'' One of the men asked if Kline was doing the hiring, and Kline said no, that he was just taking care of the list and that Mason, the transportation coordinator, was doing the hiring. Dino Barber then said that they had just spoken with Mason and that Mason had told them that Kline was doing the hiring. Again, Kline said that he was just taking care of the list and that Mason was doing the hiring. At this point Dino Barber told Kline to wait a minute and said that he would go and get Mason and bring him in the office. Dino Barber walked out of the office to look for Mason and met him just outside in the hallway. Mason entered the room, and Kline asked Mason if he knew the three men. Mason said, sarcastically, according to Abli, ''Yeah, they are members from Local 104.''[5] Kline replied, ''We are not [a] union show, and we are not hiring any union members from Local 104 or any other Teamsters Local.'' Al Barber then asked whether Kline was sure he knew what he was saying, and Kline said yes. Al Barber then turned to Malden and asked Malden what his name was. Then he asked Malden if he heard what Kline had said. Malden nodded affirmatively, and Kline interrupted and said, ''I mean it.'' Then the men left the premises.

Zollman, production coordinator, who identified Al Barber as someone who is closely associated with the Teamsters Union, testified that she was on the telephone when the three individuals entered her office and that she asked them to wait a minute. Al Barber interrupted her telephone conversation and said he would like to see Hank Kline. Zollman said she

[2] The Respondent had rented six suites on the second floor of the hotel for its offices during the filming.

[3] Al Barber, a former Teamsters business representative in Alaska, apparently utilizes his labor relations background to unofficially advise his fellow-members who, according to Parker, seek his assistance regarding their rights. Thus, Barber testified that sometimes he tries to get things ''squared away'' and acts as a ''mediator'' on behalf of the employees.

[4] Zollman's account of the incident appears infra.

[5] Mason testified that Kline asked, ''Who are these people?'', and Mason answered, ''they are Teamsters from Local 104.'' Mason testified that he merely intended to answer Kline's question and was not being sarcastic.

would see if Kline was available, and then continued her phone conversation, at which point the three men walked out of her office and back into Kline's office. She hung up as soon as she could and when she entered the room next door Al Barber was already speaking to Kline. Then she returned to her office and did not hear their conversation.

The record indicates that Kline was terminated by Respondent on April 13 or 14, 1988, and the Respondent elected not to subpoena him for the hearing. Thus, only Malden, who testified at the hearing, was in a position to corroborate the foregoing testimony of Zollman. However, Malden testified that he believed Zollman had brought the men back into the room, as he observed that Zollman was ahead of the three men when he looked up from his desk. Malden testified: ''So she [Zollman] was either a step ahead or right beside of Al Barber and she was with them as they were coming in the room . . . so I assume she had brought them into the room.''

Malden's version of the ensuing conversation is as follows: Malden turned and looked up when he heard Al Barber say to Kline, ''You are Hank Kline.'' Kline said he was in a meeting, and the men could make an appointment to meet with him. Al Barber said, ''I just want to know one thing. I want to know if you are hiring Teamsters.'' Kline repeated, ''If you want to talk to me, you can make an appointment.'' Al Barber said, ''That's not what I asked you. I want to know if you are hiring Teamsters.'' He repeated this three or four times, and Kline said, ''We're hiring drivers . . . if you want to go to the production office and make an appointment, I'll meet with you.'' Then Al Barber approached Malden, stuck his finger within several inches of Malden's face and asked, ''Who are you?'' Malden told him. Then the men left.

Malden does not recall Kline saying that they were not hiring members of Local 104 or any other union. Further, Malden does not recall Mason ever coming into the room; nor, therefore, did he hear Mason identify the men as members of the Union. Malden admitted that it was possible he was just trying to avoid having to deal with the situation and, therefore, he was intentionally inattentive to the discussion. About 20 minutes after the conversation ended, Malden told Mason, ''I never want to see those goons again.''

Mason testified that after entering the room and telling Kline that the men are ''Teamsters from Local 104,'' Al Barber pointed his finger at Malden and repeatedly asked, ''Who are you?'' However, Mason does not recall anything else about what was said or what happened during that particular conversation.

The record shows that of approximately 34 employees in the transportation department who were hired to work on the movie, approximately 8 of them were members of a Teamsters local. Only five of the total employee complement were hired prior to April 1. Apparently, the filming was completed on about April 30.

2. The refusal to hire Luke Jordan and John Fruin

Luke Jordan is a member of the Union but has been suspended since March 1987 for nonpayment of dues. He has been a driver in the movie industry for the past 6 years, and has driven every type of vehicle. He purchased an insert car from Al Barber[6] in October 1987. He has known Mason for 2 years and worked with him on one commercial. On March 30 Jordan and John Fruin went to Respondent's offices at the hotel to apply for a position on the ''Desert Rats'' production. Jordan was interested in a job as a driver with or without his insert car, and Fruin apparently was looking for a job as a key grip.[7]

After introducing Fruin to Mason, Jordan requested employment as a driver, but also offered to rent his insert car to the Respondent. Fruin, according to Jordan,[8] said he had a 4-door pickup for rent for use as a transportation vehicle. Mason replied, according to Jordan, that ''he wasn't interested in anybody affiliated with Al Barber or any piece of equipment affiliated with Al Barber in any way.'' Jordan replied that although he had purchased the insert car from Barber, he was not affiliated with Barber in any way; that he and Fruin were just seeking employment as drivers; and that the insert car was optional. Mason replied that as far as he was concerned, Jordan was affiliated with Al Barber. The conversation was very brief.

Mason testified that he knew Luke Jordan from working with him on one other show, but had never met Fruin. Mason gave the following account of the conversation: Jordan asked him whether he needed an insert car and Mason said no, that it was Al Barber's car, and he did not want it.[9] Jordan said that he had purchased it from Barber, and Mason said it did not matter who owned the car, he did not want it.

Mason testified that the car is ''unsafe, dangerous, junk,'' and that Jordan only wanted to work as a driver of that particular car and not as a driver of other vehicles. Fruin, according to Mason, never applied for any type of job.[10]

3. The refusal to hire Harry McCrorey

Harry McCrorey has been a wrangler driver in the movie industry for 20 years.[11] He is a member of the Union herein. He has worked with Transportation Coordinator Kenny Mason on 10 or 12 shows since 1972. In February and March, Mason was the transportation coordinator on the movie ''Unholy Matrimony,'' which was filmed in Phoenix, Arizona. Mason hired McCrorey for the production. During the filming a dispute arose between management and the drivers regarding the drivers' job description and hours of work. On March 5 seven drivers, including McCrorey, signed a petition stating that they were entitled to an extra day's pay. On the day after the petition was submitted to Mason,

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[6] An insert car is a specialized vehicle that carries cameras and camera crew and is used for filming chase scenes. It follows or tracks the action being filmed.

[7] A key grip assists in setting up or rigging the insert car to provide it for holding the cameras, and helps with lights and flags. Fruin also apparently leases car mounts to production companies. Car mounts are used for rigging or attaching the cameras to the framework of the insert cars.

[8] Fruin did not testify in this proceeding.

[9] The record is clear that the insert car, while owned by Barber, was unsafe. However Jordan, who had reconstructed it, testified that after considerable reconstruction work the vehicle was in very good condition, and that Mason had knowledge of this as Mason was present on an occasion in February or March, when Jordan had taken the car apart for cleaning.

[10] Respondent's answer to the complaint admits, however, that Fruin did apply for work.

[11] A wrangler is an individual who is responsible for the care of the livestock and other animals, and performs any other work necessary for their care and transportation.

the production company discharged all of the employees who signed the petition. Thereafter, an unfair labor practice charge was filed by the Union.

McCrorey testified that in the latter part of February, during the filming of ''Unholy Matrimony,'' Mason told him that Mason had prospects of being hired for another movie. McCrorey said he would like to work for Mason again, and Mason said, ''You will be on it.''

McCrorey attempted to contact Mason by telephone on six or eight occasions after he learned that Mason was transportation coordinator for ''Desert Rats.'' He telephoned Mason's home and the ''Desert Rats'' production office, and also sent Mason a certified letter requesting employment. Mason never returned his calls or answered his letter. On March 24 he wrote a letter to Production Manager Kline at the Sheraton Mission Palms Hotel, seeking employment. A few days later he sent the same letter to Mason. McCrorey received no response to any of his letters or phone calls.

On March 28, accompanied by his wife, he went to Respondent's headquarters at the hotel to see Mason or Kline. He initially spoke with Kline, who told him that Mason did the hiring, and that McCrorey would have to see Mason about a job. During his subsequent conversation with Mason, McCrorey said that he would like to go to work and hoped that Mason did not hold the grievance in ''Unholy Matrimony'' against him. Mason replied, according to McCrorey, that ''In this business . . . you don't know who your friends are.'' Mason continued talking about the grievance petition and said it got him in a bad spot with his production manager, James Margellos, as Mason, when hired, had assured Margellos that there would be no problems with union drivers on that production. McCrorey repeated that he would like to go to work and hoped that Mason would not hold that incident against him. Mason replied that the Union might picket ''Desert Rats.'' McCrorey replied that he would not cross a picket line.[12] Again McCrorey asked him for a job, and Mason said there was nothing he could do for him. McCrorey then left, and Mason never contacted him. Karen McCrorey, Harry McCrorey's wife, corroborated his testimony.

Mason testified that while working on ''Unholy Matrimony,'' he anticipated being hired as transportation coordinator for another movie, ''Checker 500,'' and that he was considering McCrorey for that production rather than ''Desert Rats'' when, in February, he spoke to McCrorey about future employment. However, when asked what difference it made whether McCrorey worked for him on one show or another, Mason testified, ''I'm not sure.''

Mason, who began working for the Respondent on March 16, testified that ''Desert Rats'' was a pilot movie with the possibility of becoming a series, and he explained that when a series is being filmed it is customary to hire the crews locally due to the ongoing nature of the filming, thus saving transportation and housing expenses. In anticipation of subsequent filming, according to Mason, Production Manager Malden told him to hire local drivers for the filming of ''Desert Rats.'' Mason further testified that he customarily hired drivers whom he knew and who had previously worked for him; and that on ''Desert Rats'' he hired three of the seven employees who signed the ''Unholy Matrimony'' grievance and also offered a job, which was not accepted, to a fourth employee who had signed the grievance.

Regarding the March 28 conversation with McCrorey and his wife, Mason testified he was in a hurry and that the McCroreys caught him in the hallway and Mason was trying to get away. McCrorey said he hoped Mason would not hold ''Unholy Matrimony'' against him, and Mason said he would not. McCrorey asked if there was going to be any work, and Mason said he did not know. Regarding his failure to answer McCrorey's telephone calls and letter, Mason testified that he was still talking to attorneys about the NLRB matter that evolved from the discharges in the ''Unholy Matrimony'' affair, and that he sent word to McCrorey through a friend advising McCrorey that because Mason's name was mentioned in the charge, he did not feel that he should be talking to McCrorey or to the other individuals who had brought the charge.[13] Further, Mason said that McCrorey had stated that he had been hired to work on a movie in Virginia, so Mason presumed he had a job.

Most importantly, Mason testified that he considered hiring McCrorey for ''Desert Rats'' but did not hire him because McCrorey, who lived in Tucson, was not local. Mason acknowledged that if McCrorey had been local, there would have been no reason for refusing to hire him.

Although the McCroreys reside in Tucson, they own a camper. They lived in it during the filming of ''Unholy Matrimony'' in Phoenix. According to Harry McCrorey, Mason knows about the camper and has been inside it. Further, McCrorey testified that lodging expenses are customarily not reimbursed to employees who live in Tucson and work in the Phoenix area.

C. *Analysis and Conclusions*

1. The refusal to hire Al Barber, Dino Barber, and Demir Abli

Gerald Marshall impressed me as a credible witness and appeared to have a reliable recollection of the initial March 23 conversation. I credit his testimony to the effect that Al Barber's entrance into the room and the manner in which he asked for Kline was perceived by Malden, Kline, and Marshall to be brusque and impolite. While this may have been unintentional on Al Barber's part, or perhaps merely a characteristic of Barber's customary persona, I find that Kline and Malden were left with a less than favorable first impression.

Thereafter, during the remainder of the March 23 scenario, I find the facts to be substantially as testified to by the three applicants for employment, and I discredit the testimony of Malden, Mason, and Zollman to the extent that their testimony differs substantially from that of the three men. Thus, I find that Zollman escorted the men back into Kline's office, and that Kline requested that the men place their names on a list of prospective employees and stated that the Respondent would get in touch with them. This was not satisfactory to the trio, however, and they asked whether Kline was doing the hiring. When Kline said no, that Mason was doing the hiring and Kline was merely taking care of the list of applicants, the men found this response to be unacceptable

[12] The Union did, in fact, picket the production commencing on April 11.

[13] The record shows that in fact Mason did communicate this concern to McCrorey through a mutual friend.

as they had received contrary information from Mason. Thereupon, they refused to accept at face value Kline's representations regarding the hiring list and Mason's authority to do the hiring, causing Kline to again repeat what he had told them twice before, and directed Kline to wait a minute while they sought out Mason in order to resolve the matter.

Not only does the foregoing exchange, related by the three individuals, whom I credit, support and lend credence to Marshall's testimony regarding the unconventional behavior of Al Barber during the initial introductory meeting, but it also provides convincing justification for Respondent's subsequent decision not to hire them under any circumstances. This was not a grievance meeting. Rather, the men were seeking employment. And the appropriate and conventional behavior under such circumstances would have been to follow Kline's initial instruction to leave their names rather than to repeatedly contradict Kline and then attempt to take it upon themselves to resolve any inconsistencies. As applicants for employment their performance was less than stellar: Their entrance was awkward, and they did not readily pick up on repeated cues to exit.

Kline, having been advised by Marshall, knew from the outset that they were members of the Teamsters but nevertheless requested that they leave their names. Kline's subsequent statement that, ''We are not a union show, and we are not hiring any union members from Local 104 or any other Teamsters' Local,'' perhaps was made out of frustration, believing that it was the most direct way to get rid of the applicants as they appeared to be insensitive to any more subtle suggestion. Whatever Kline's motivation, I find that the statement is violative of Section 8(a)(1) of the Act, as alleged. *Young Hinkle Corp.*, 244 NLRB 264, 267 (1979).

However, despite Kline's unlawful remark, I find the record evidence insufficient to warrant the conclusion that the three men were denied employment because of their union affiliation or activity. Thus, the record shows that the Respondent did, in fact, hire eight union members for the production and that the behavior of the trio, who acted in concert rather than in an individual capacity,[14] was confrontational and did not comport with the conventional manner of seeking employment.

Further, the record is clear that Mason, who had been a transportation coordinator for various production companies, makes it a practice to select drivers who have worked for him on prior occasions as he is thus familiar with their work performance. None of the three individuals have ever worked for Mason, and although Al Barber and Mason apparently were employees of the same production companies on two different movies, there is no evidence that they worked closely together or that Mason was cognizant of Al Barber's work performance. It should be noted that Mason had a long list of applicants from which he could make his selections as he received 10 to 15 calls daily, between March 16 and the end of March, from people applying for jobs.

On the basis of the foregoing, I find that the General Counsel has not established a prima facie case of unlawful refusal to hire, and the record evidence is therefore insufficient to warrant the finding that the men were denied employment because of their union activity or affiliation.

2. The refusal to hire Luke Jordan and John Fruin

I credit the testimony of Luke Jordan and find that his March 30 conversation with Mason occurred substantially as Jordan testified. As I have previously determined that the record evidence is insufficient to show that the Respondent's denial of employment to Al Barber was unlawful, it follows that the record evidence regarding Mason's subsequent refusal to consider Jordan and Fruin for employment because of Jordan's suspected affiliation with Al Barber, must similarly be found to be insufficient to warrant the finding of unlawful motivation.

Thus, Mason had previously been instructed by Malden not to hire Al Barber or the men who accompanied him on March 23, 1 week earlier, because of their unacceptable behavior. Mason apparently believed that Jordan, too, was an associate of Al Barber, primarily as a result of Jordan's ownership of Al Barber's insert car. While Mason's rationale or motivation for refusing to consider Jordan or Fruin for employment may have been unfair and unwarranted, it was not, I find, unlawful within the purview of the Act. Therefore, I shall dismiss the allegations of the complaint pertaining to Jordan and Fruin.

3. The refusal to hire Harry McCrorey

I credit McCrorey's testimony in its entirety, and find that prior to the filing of the ''Unholy Matrimony'' grievance petition, Mason told McCrorey, who had worked for Mason on numerous shows, that McCrorey would be hired for the next movie. The record is clear that, as a practical matter, it made absolutely no difference whether the next movie was ''Desert Rats'' or any other production. Further, during the March 28 conversation, Mason told McCrorey, in effect, that he was upset with McCrorey's participation in the ''Unholy Matrimony'' grievance because it affected Mason's relationship with his production manager and added ''You don't know who your friends are.''

Mason admitted that the only reason for failing to hire McCrorey was because he did not reside in the Phoenix area where it was anticipated that the entire series would be filmed, and that therefore it would have been more expensive for the Respondent to keep him on the payroll for a protracted length of time due to Respondent's practice of paying living expenses.[15]

I find Mason's proffered explanation to be totally unsupported by the record evidence. ''Desert Rats'' was a pilot movie for a possible series. Further filming had not yet been planned and was dependent upon the reviews of the pilot production. Thus, it is clear that, at least initially, McCrorey would have been employed only for the brief duration of ''Desert Rats,'' and that any further employment opportunities in the event of favorable reviews would have been at some indefinite time in the future. Further, and most importantly, there is no evidence that the Respondent did, in fact, except in isolated instances, pay living expenses to drivers or

[14] In this regard it appears that they desired to be hired immediately and thereby were putting the Respondent in the rather awkward position of having to make a hiring decision in their presence. Indeed, the situation would be all the more awkward in the event the Respondent would have then elected to hire one or two but not all three applicants. Thus, the need for them to sign the list and leave the premises is apparent.

[15] It should be noted that the fact that McCrorey told Mason he would not cross a picket line was not proffered by Mason as a reason for refusing to hire McCrorey.

other transportation department employees. In this regard, I credit McCrorey, who testified that reimbursement for such expenses was not the customary practice in the industry, and Respondent has not shown otherwise. Finally, although McCrorey maintained his residence in Tucson, the evidence shows that Mason was aware that McCrorey customarily lived in his camper during his employment outside the Tucson area.

On the basis of the foregoing, I find that Mason's purported reason for failing to hire McCrorey is pretextual, and that the record evidence is clear that but for McCrorey's concerted and protected participation in the ''Unholy Matrimony'' grievance petition against Mason, he would have been hired for the ''Desert Rats'' production. Under the foregoing circumstances the fact that Mason did hire other employees who were also involved in the ''Unholy Matrimony'' grievance is not sufficient to show that Mason harbored no particular animosity toward McCrorey for the same activity. Therefore, I find that Respondent's refusal to hire McCrorey was violative of Section 8(a)(1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent told applicants for employment that it would not hire union members, in violation of Section 8(a)(1) of the Act.
3. The Respondent failed and refused to hire Harry McCrorey, in violation of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent has not, except as specifically found above, violated the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act, and take certain affirmative action described herein, including the posting of the attached notice.

Having found that Respondent unlawfully refused to hire Harry McCrorey, it is recommended that Respondent make him whole with interest for any loss of pay he may have suffered as a result of the discrimination against him. In this regard, it appears that he would have been employed from about April 1 to April 11, 1988, the date the picketing commenced, as McCrorey testified that he would refuse to cross a picket line. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizon for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 139 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Cine Enterprises, Inc., Tempe, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling applicants for employment that union members were not being hired.

(b) Refusing to hire employees because they engaged in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Harry McCrorey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Post at its principal place of business copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''